Supreme Court, U.S.
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No. 031051

IN THE
SUPREME COURT OF THE UNITED STATES

MARK AND JOAN HEFFINGTON
Plaintiffs-Petitioners, Pro Se,

v.

BOB COOK HOMES, L.L.C.,
LUSK COMMUNITIES, INC.,
(A/K/A LUSK REAL ESTATE CO.),
HUCKLEBERRY, INC.,
WILLIAM E. LUSK, JR.,
BAUGHMAN, CO., P.A.,
PREFERRED PROPERTIES OF KANSAS, INC.,
REMAX REALTY PROFESSIONALS,
WESLEY E. GALYON,
MARK G. AYESH,
Defendants-Respondents.

On Petition for Writ of Certiorari
To The United States Supreme Court

PETITION FOR WRIT OF CERTIORARI

Mark and Joan Heffington
Plaintiffs-Petitioners, Pro Se
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(316) 788-0901

Questions Presented For Review

1. Whether petitioners were deprived of liberty and property without due process of law.

2. Whether petitioners had the right to be represented by counsel and whether their right to due process was violated when the defendants and their counsel acted to deny them representation by influencing attorneys, the news media and local, state and national agencies.

3. Whether Kansas state law is unconstitutional in mandating that a corporation must be represented by a licensed attorney in a lawsuit.

4. Whether the petitioners as pro se litigants should have been held to the same rules as those represented by counsel, and whether their due process right to be heard, equal protection rights, and right to a trial by jury were violated.

5. Whether the actions of the defendants, their counsel and the court is shocking to the conscience and considered "outrageous government conduct."

6. Whether this case should be decided on its merits and remanded back to the district court to ensure due process.

7. Whether the United States legal system should take affirmative steps to effect "justice for all" by passing Amendment XXVIII to the U.S. Constitution requiring computerization of all evidence prior to filing any lawsuits/charges against a person or entity: (1) to prevent attorneys from violating the constitutional rights of citizens; (2) to ensure that attorneys abide by the same laws as citizens; (3) to protect parties in interest that are not in the courtroom; (4) to protect the overall integrity of the system of justice; and (5) to ensure that justice above money prevails in our legal system.

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On Petition for Writ of Certiorari
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PETITION FOR WRIT OF CERTIORARI

Mark and Joan Heffington, the petitioners herein, respectfully pray that a writ of certiorari issue to review the judgment of the Kansas Court of Appeals, entered in the above-entitled case on July 3, 2003.

OPINIONS BELOW

The July 3, 2003 opinion of the Kansas Court of Appeals whose judgment is herein sought to be reviewed, is reported in Case No. 02-88617-A on July 3, 2003 as unpublished, and

is reprinted in Appendix A of this petition.

The Kansas Supreme Court denied petitioners' Petition for Review on September 24, 2003 and it is reprinted in Appendix B of this petition.

JURISDICTION

The judgment of the Kansas Court of Appeals was entered July 3, 2003. On August 1, 2003, petitioners entered their Appellants' Petition for Review to the Kansas Supreme Court. On September 24, 2003, the Kansas Supreme Court denied their Petition for Review. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. @ 1257.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, LAWS, RULES AND REGULATIONS

U.S. Const. Amend. V
U.S. Const. Amend. VI
U.S. Const. Amend. VII
U.S. Const. Amend. XIV
18 USC@242 & 245; 42 USC @1983 Denial of Rights Under Color of Law
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Supreme Court Rule 141
Supreme Court Rule 10(a) & (c)
Rule 601A, Canon 3E(1) & 3F

STATEMENT OF THE CASE

In February, 1999, petitioners Mark and Joan Heffington, as individuals, purchased Lot 9, Block D, of the Huckleberry Estates Addition from defendant Lusk Communities, Inc., to construct a home for resale. Lusk Communities, Inc. was the area developer and Huckleberry, Inc., was a separate entity set up by their President, William E. Lusk, Jr., to protect his assets.

Prior to their purchase, the Vice-President of Lusk Communities, Inc. had mailed petitioners an area rendering and an area plat (see Appendix D: Exhibits A & B) which did not show the existence of any water on this property. Petitioners were given no other information in regard to drainage of Lot 9 by defendants the Lusk entities, or his listing and selling agents, ReMax Realty Professionals and Preferred Properties Of Kansas, Inc.

During construction in July 1999, Mrs. Heffington incorporated her business as Heffington Homes, Inc. with the intent of building speculative homes for resale. Upon completion of her first home on Lot 9, Mrs. Heffington received front page publicity as the first female builder to join the Wichita Area Builders Association.[1] She became acquainted with WABA President, defendant Galyon, but was uncertain later when he commented: "Stick with me, and I'll make you a star."

In November, 1999, defendant Bob Cook Homes, L.L.C., an experienced contractor, began construction of a residence adjacent to petitioners. He negligently constructed this residence in the path of a stream which had been hidden by

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[1] *See generally* Stan Finger, "*Wife, mother, general contractor...* ", The Wichita Eagle, Oct. 2, 1999, at 1a.

dense trees. When it rained heavily in late February, 2000, severe flooding occurred to the backyard of petitioners' property making it extremely difficult to sell (see Appendix D: Exhibit C – GIS Aerial Photo & Exhibit D – Flooding Photo: March, 2000). This constituted a private nuisance, intentional private nuisance, negligence and trespass. Defendant Lusk (the Lusk entities) had breached petitioners' contract by misrepresenting the property, negligently failing to provide a drainage easement and failing to provide adequate drainage information to petitioners prior to purchase. Defendant Baughman Co., P.A., who engineered the plat for 64 lots in the Huckleberry Subdivision, was negligent in failing to provide a drainage easement across the back of the properties in question. Two inspectors and later on, four drainage experts, agreed that a catch basin was needed, with excavation under the road into the area pond, but this could cost $50,000 or more. They advised petitioners that in a 6-inch rain, the basement of the home they had constructed would flood.

In April, 2000, Mrs. Heffington contacted defendant Galyon, WABA President, for a resolution. She told him they had no money, and that her husband was turned down for a $4000 loan to bring in fill dirt as a temporary solution. Defendant Galyon reviewed the situation with defendants Cook, Lusk and Baughman. He eventually advised Mrs. Heffington that Lusk had no responsibility and to repair it herself, or she would be ruined as a builder.

In April, 2000, Mrs. Heffington signed a contract as President of Heffington Homes, Inc. with defendant Ayesh to file suit against defendants Cook, Lusk and Baughman. He confidently prepared a petition and told her he was suing for a million dollars. A week later, after conferring with opposing counsel, he advised Mrs. Heffington it was only a $5000 case. He told her she should just drop it, they didn't

have to give her anything, they all had big power and money, and she couldn't win because she had no money.

The matter dragged on for months as defendant Ayesh continued to refuse to file the suit. Petitioners relied to their detriment, suffering severe emotional distress and financial hardship (see Appendix D: Exhibit E). Their 17-year old son left home, telling them it would be easier to take care of three kids instead of four. When Mrs. Heffington called defendant Galyon in July, 2000, he commented to her: "Bet you won't make those mistakes again, will you?"

Mrs. Heffington's mother died of cancer and she used her minor inheritance to purchase fill dirt as a temporary solution. The home they had constructed on Lot 9 finally sold in September, 2000; however, inspectors still confirmed that the basement would flood in a 6-inch rain. The Heffingtons were near to a divorce and bankruptcy over the matter. In October, 2000, defendant Ayesh advised Mrs. Heffington to accept a $10,000 release and settlement agreement with no repair of the drainage problem. He told her that it was "all you're going to get." Prior to having her sign the agreement, however, he changed the amount to $1 and told her to "just sign it anyway, we all know it's really $10,000." Mrs. Heffington promptly terminated his services in November, 2000.

Defendant Ayesh failed in his legal duty to advise the Heffingtons that the defendants had insurance to cover the matter. Mrs. Heffington discovered this through a routine insurance call and tried to resolve the matter directly with Cook's insurance company. In December, 2000, Cook's insurance company refused to consider her list of damages, stating that $10,000 was all they would get. Mrs. Heffington then contacted the Kansas Insurance Commission but was told the courts would have to work it out.

In March, 2001, it rained two inches and the backyard of the residence constructed by petitioners flooded within 15 feet of the foundation (see Appendix D: Exhibit D – Flooding Photo: March, 2001.) The owners told petitioners they were afraid, since both of their children slept in the basement. Mrs. Heffington filed the suit herself on March 12, 2001, hoping to find someone to represent them along the way. She contacted more than 45 attorneys, many of whom helped them until they conversed with opposing counsel. Then she would never hear from them again.

Over a six-month period, she contacted the mayor, both city and county commissions, several local and state representatives, the Sedgwick County District Attorney's office, the Kansas Real Estate Commission, Kansas Attorney General's office, State Disciplinary Administrator, State Board of Technical Professions, Kansas Securities & Exchange Commission (for violations of the Kansas Uniform Land Sales Practices Act), NOW, local and National Association of Home Builders, ACLU, and numerous members of the news media in the hopes of acquiring an attorney. The petitioners received no legal assistance.

In August, 2001, petitioners' initial negligence claims were upheld when the district court ruled against defendant Lusk's motion for summary judgment. Judge Friedel stated that petitioners' expert drainage reports were impressive, and ruled they had substantially complied with Supreme Court Rule 141. He told them they could change their petition any way they wanted, but it would be the last time they could. (This statement was later missing from the court transcript.)

Petitioners' Third Amended Petition filed August 13, 2001 alleged that defendants Cook, Lusk and Baughman, together with defendant Galyon and their former attorney defendant Ayesh, engaged in civil conspiracy, collusion and fraud in an effort to convince petitioners they had no legal

claims against the defendants, and to cause them intentional emotional distress and financial hardship. They further alleged that defense counsel assisted their clients in these claims by devising a "schemed plan." Petitioners first alleged violations of the Fifth Amendment in Fact #85 of their Third Amended Petition in this manner:

> "The schemed plan included, and continues to include, the influencing of numerous attorneys contacted by Mrs. Heffington in order to deprive plaintiffs of proper legal representation and cause them to lose their case. Such actions are a violation of the Fifth Amendment regarding plaintiffs' right to due process of law."

Defendants Lusk and Ayesh immediately filed motions to dismiss the fraud claims on the basis that they were not stated with particularity. Defendant Galyon appeared at this hearing, and in spite of a convincing affidavit from one of petitioners' witnesses, Judge Kennedy quickly dismissed the claims of conspiracy and fraud.

From this point on, petitioners were unsuccessful at nearly every discovery hearing, could not get a waiver of the attorney-client privilege, and were sanctioned when they lost in their attempt to add punitive damages. The defendants, their counsel and the court were well aware that Mrs. Heffington's health had continued to deteriorate as she struggled with briefs and deadlines through 24 hearings and 11 depositions against six corporate attorneys. Premier attorney Randy Rathbun had admitted to her in front of witnesses that "they're just going to keep beating you up until they wear you down." Although Mrs. Heffington had asked the district court on several occasions to appoint them counsel, petitioners were denied.

Mrs. Heffington had also tried on many occasions to settle the matter, especially after September 11. The defendants and their counsel ignored her requests, and continued to insist that petitioners' claims were only worth $10,000 at best, in spite of their list of damages. Even though mediation had been suggested off the record, defense counsel refused. This option was never considered or ordered by the court at any time.

In October, 2001, defense counsel for defendant Cook allowed Mrs. Heffington to review his client's business files, admitting these were not attorney-client privileged. There she discovered a letter from Cook's previous attorney to him just prior to the $10,000 settlement offer a year earlier when petitioners were represented by defendant Ayesh (see Appendix D: Exhibit F.) This was the "smoking gun" which proved that the civil conspiracy/ collusion and fraud had occurred; however, Judge Yost deemed it was probably "attorney-client privileged."

At the pretrial conference, petitioners identified over 150 laws, statutes, rules and ordinances violated by the defendants, including the Kansas Uniform Land Sales Practices Act, Kansas Consumer Protection Act,Obstructions in Streams and many others. Petitioners also alleged violations of the Fifth Amendment again in their pre-trial questionnaire, as well as Denial of Rights Under Color of Law and the right to be represented in a civil matter. They tried to add claims of "res ipsa loquitor", intentional fraud, emotional distress and tort of outrage, but Judge Kennedy denied these as untimely in November, 2001.

A few weeks earlier while trying to conduct depositions, Mrs. Heffington suffered an acute anxiety attack and was hospitalized. Her health was still failing as she tried to prepare her response to the defendants' motions for summary judgment in December, 2001. Although she could not locate

Supreme Court Rule 141 at the time, she made every effort to comply according to the comments previously made by Judge Freidel. For health reasons, she combined everything into one document which addressed all of the defendants' voluminous motions.

Being without counsel, Mrs. Heffington had been unaware they needed to file a Request for Admissions of their evidence. In case they had somehow erred, petitioners asked the court to read and review **all** of their evidence in this matter, bringing several boxes and all of the depositions with them to the final summary judgment hearing. In spite of over 500 pieces of evidence including continuous e-mails to the Wichita Eagle reporter, notes and letters attempting to settle/acquire an attorney, and a "smoking gun" to prove intentional fraud and conspiracy had occurred, Judge Woolley abused his discretion by dismissing all of petitioners' claims at the second summary judgment hearings on December, 20-21, 2001.

In their Brief of Appellants filed August 26, 2002, the petitioners again alleged violations of the Fifth Amendment; Sixth and Fourteenth Amendments, and numerous other laws including 18 U.S.C.@242, 245 and 42 U.S.C.@1983. The Kansas Court of Appeals affirmed the rulings of the district court on July 3, 2003, and on September 24, 2003, the Kansas State Supreme Court refused to allow a rehearing.

Petitioners allege that the defendants and their counsel denied them due process of law by fraudulently influencing their previous attorney (defendant Ayesh) to convince them their claims were worthless, influencing other attorneys not to represent them, and influencing the news media not to give them any publicity so they would lose their case. Furthermore, after petitioners filed their appeal, the defendants, their counsel and court officials engaged in evidence tampering by removing and altering court docu-

ments in petitioners' court file. Petitioners allege violations of Amendments V, VI, VII and XIV to the U.S. Constitution, outrageous government conduct, and other numerous laws.

A. Abuse of Discretion

The Kansas Court of Appeals fails to address many key issues and allegations raised by petitioners. For instance, Judge Woolley should have recused himself at the second summary judgement hearing not just because he worked for the defendant Lusk's law firm five years earlier, but because petitioners verbally objected to having him hear the case. After he returned to the courtroom, Mrs. Heffington stated for the record: "We don't think you should hear this case." Judge Woolley ignored her objection, and went on to hear the case anyway. (This statement was later found missing from the court transcript.) This is a violation of Rule 601A(F) of the Code of Judicial Conduct, since the Heffingtons did not waive disqualification. Without legal counsel, petitioners were unaware until months later that they could have filed a motion to recuse Judge Woolley.

The appellate court also fails to address the individual Blue File folders hand-carried by Mrs. Heffington to each of the defense attorneys along with their response to the second motion for summary judgment – too voluminous to be attached. Each held over 60 pieces of evidence to support the petitioners' facts stated in this case. The Blue File court copy was kept in the deposition file drawer of the clerk's office, and Mrs. Heffington noticed that it was missing from the stack of files reviewed by Judge Woolley at the hearing on December 20, 2001. The summary judgment hearing was continued to the next day so that he could locate and review it. At that time, petitioners also gave him copies of all of the depositions, since it appeared to them that these were not in his stack either.

Abuse of discretion occurred since petitioners had failed to file a Request for Admissions of their evidence (eg., the president of Baughman admitted in his deposition that he "should have put a drainage easement across the back of the lots." Even though plaintiffs referred to this statement accurately and by page number in their summary judgment response brief, Judge Woolley disregarded this fact and much of their other evidence in his ruling.)

The appellate court's ruling that Judge Woolley was not impartial in the mind of a reasonable person *with knowledge of all the circumstances* is not valid. Any reasonable person who reviewed all of petitioners' affidavits and evidence, and being aware of the extent to which the defendants and their counsel had influenced other attorneys and local, state and national agencies in this matter, would not be comfortable with a judge who was formerly a partner of defendant Lusk's law firm. As to the reason why petitioners did not file a motion for a change of judge or try to comply with statutes in this regard, again, they did not have adequate knowledge of legal procedure while proceeding prose.

In their struggle to proceed, the Heffingtons were unaware they could not file a motion to amend to add a claim for punitive damages after their fraud-based claims were dismissed. The lower courts disregarded the affidavit of Mrs. Heffington because it was not prepared exactly as required, even though it was sufficient to show "willful, malicious and wanton conduct and intent" on the part of all defendants. The court of appeals states that "the affidavit and other attached information (including a poem by the Heffingtons' son) did not show by clear and convincing evidence, as required in *Fusaro*, that the Heffingtons would have prevailed on such a claim." The court fails to address the "Rumsey letter" (Appendix D: Exhibit F) which was attached to their motion and included in the Blue File Folder at the motions for summary judgement - clear and

convincing evidence that the Heffingtons would have prevailed on a punitive claim. (Mrs. Heffington later found this and nine other documents missing from the court file; however, Judge Woolley ordered copies reinstated prior to submission of the ROA to the court of appeals.)

The court of appeals fails to address many allegations by petitioners, including specific incidents of evidence-tampering by court officials mentioned in their Brief of Appellants. This is contrary to *Allegri v. Providence-St. Margaret Health Center* which states:

> An appellate court, in examining the validity of a motion for summary judgment, should read the record in a light most favorable to the party who defended against the motion and should accept such party's allegations as true, giving him the benefit of the doubt when his assertions conflict with those of the movant. *Allegri v. Providence-St. Margaret Health Center,* 684 P.2d 1031, 9 Kan.App.2d 659 (1984).

The court of appeals continues to abuse its discretion by stating that they felt no need to "extend their opinion with a detailed analysis of each motion and the reasons given by the district court to conclude a particular defendant was entitled to summary judgment." Due to such clear and convincing evidence, any reasonable person would believe that defendants Cook, Lusk and Baughman were obviously negligent in causing the flooding to petitioners' property. Furthermore, no reasonable person could believe the court of appeals had carefully reviewed the record to conclude "the district court did not err in its dispositive rulings in favor of each defendant." To say that for this reason, the "litigation should be brought to an end without trial" is a denial of petitioners' right to a trial by jury under Amendment VII.

Finally, the court of appeals fails to address petitioners' Letter of Authority dated February 27, 2003 in which they discuss the similarities of their case to *Campbell v. State Farm Mutual Automobile Insurance Company*, 2001 WL 1246676 (Utah 2001). The Campbells suffered from the fear of litigation and the risk of losing their assets because State Farm refused to settle their case. The jury awarded $1 million in actual and $145 million in punitive damages due to evidence of a nationwide scheme by State Farm to increase profits by refusing to pay valid claims. Any reasonable person would believe that petitioners' case was far worse: the mental anquish suffered by the Heffingtons in having to conduct their own litigation, their actual loss of considerable assets, and their loss of liberty. *Campbell v. State Farm* is significant in suggesting that petitioners' damages, actual and punitive, go beyond extraordinary.

REASONS FOR GRANTING THE WRIT

Pursuant to Rule 10 (a) & (c), the judgment of the Kansas Court of Appeals should be reviewed by this Court for two compelling reasons: (1) the lower court has so far departed from the accepted and usual course of proceedings as to call for an exercise of this Court's supervisory power; and (2) they have decided important questions of federal law that conflict with relevant decisions by this Court and that have not been, but should be, settled by this Court.

I. PETITIONERS DEPRIVED OF LIBERTY AND PROPERTY WITHOUT DUE PROCESS OF LAW

A. One's Reputation or Good Name is an Element of Liberty Protected By the Fifth Amendment.

Evidence presented by petitioners showed that Mrs. Heffington was deemed "sue-crazy" and "Typhoid Mary" in the building and real estate industry. In addition, long-time friends refused to associate with her and close neighbors rejected her. She could not obtain alternate employment as a realtor, and in four years, was never able to draw a salary as president of her company. Petitioners offered evidence including e-mails, letters and notes which make it clear to any reasonable person that defendant Galyon's influence at the local, state and national level resulted in the dismissal of their litigation without due process. Private parties may be found to have engaged in "governmental action" sufficient to subject their activities to this amendment (Amendment V). *Local 1498, Am. Federation of Government Emp. v. American Federation of Government Emp.,* AFL/CIO, C.A. Pa. 1975, 522 F.2d 486.

Mr. Galyon went on to expel Mrs. Heffington from the local builders association for filing "false litigation," all of which ruined her good name and reputation beyond mitigation. One's reputation or good name is an element of liberty protected by this amendment. *Casey v. Roudebush,* D.C. Md., 1975, 395 F.Supp.60. Petitioners were forced out of business and continue to suffer extreme property loss. Requirements of the due process clause under Amendment V apply only to denial of property or liberty rights protected by the Constitution. *National Ass'n for Advancement of Colored People (Atlanta Local) v. U.S. Postal Service,* D.C.Ga.1975, 398 F.Supp.562.

Mrs. Heffington continues to suffer defamation and public hatred from her loss of liberty. Petitioners' evidence was so strong that any reasonable person would agree that government officials and agencies had engaged in the conspiracy and fraud efforts spearheaded by defendant Galyon to deprive the Heffingtons of their liberty in this matter. In regard to the Fourteenth Amendment, private

individuals may be found guilty as principals if they aid and abet state officers in such violations. *U.S. v. Lynch*, N.D.Ga.1950, 94 F.Supp. 1011, affirmed 189 F.2d 476, certiorari denied 72 S.Ct. 50, 342 U.S. 831, 96 L.Ed. 629. Also, where the government injures a person's reputation and in so doing effects a removal, extinguishment, or significant alteration of an interest recognized and protected by law, it must give the person his procedural due. *Bartel v. F.A.A.*, 1984, 725 F.2d 1403, 233 U.S.App.D.C. 297.

In addition to Amendment V (& XIV), petitioners first mentioned violations by the defendants of 18 U.S.C.@ 242 & 245 and 42 USC@ 1983 in their pretrial questionnaire filed November 19, 2001. In this document, petitioners also raised this question regarding Amendment VI:

> "If an individual has a constitutional right to have an attorney appointed to represent him in criminal matters if he can't afford one, shouldn't an individual have the right to an appointed attorney in civil matters if he can't afford one?"

These same violations were also pled in appellants' brief to the court of appeals. In regard to 18 U.S.C.@242, this statute makes it criminal to act willfully and under color of state law to deprive a person of rights protected by the Constitution or laws of the United States which encompasses rights protected by the due process clause of the Fourteenth Amendment. *U.S. v. Lanier*, U.S. Tenn.1997, 117 S.Ct. 1219, 520 U.S. 259, 137 L.Ed.2d 432, on remand 114 F.3d 84, on remand 123 F.3d 945.

II. PETITIONERS HAD CONSTITUTIONAL RIGHT TO RETAIN HIRED COUNSEL

A. Right to Due Process Violated When Defendants and Their Counsel Acted to Deny Petitioners

Legal Representation

The defendants and their counsel knew from the onset that petitioners had little money. When Mrs. Heffington managed to obtain a contingency contract with defendant Ayesh to represent them, they influenced him to convince petitioners for seven months their claims were worthless and their damages nil. Defendant Ayesh violated his legal duty to advise petitioners that the defendants had insurance to cover the claims, and fraudulently advised petitioners to sign a worthless settlement agreement. Petitioners finally terminated his services and were forced to file the suit themselves.

During the ensuing litigation, there was clear and convincing evidence to show that the defendants and their counsel further influenced other attorneys, numerous local, state and national agencies, and even the news media so that petitioners would not be able to acquire legal representation in this matter. Defense counsel and even the courts tried to convince them their claims were only worth $5000-$10,000, in spite of such evidence and a "smoking gun" which showed that conspiracy, collusion and fraud by the defendants and their counsel had occurred . In cases such as this, where even the criminal intent of fraud was clear and convincing, the court should have inquired as to whether petitioners needed counsel and provided it to them.

The dismissal of all claims in this case contravenes the petitioners' right to due process of law under Amendment V and XIV of the U.S. Constitution. The Heffingtons had the constitutional right to be represented by counsel in this matter, and were deprived of this by defendants and their counsel. A civil litigant has a constitutional right deriving from due process to retain hired counsel in a civil case. *Gray v. New England Tel. and Tel. Co., C.A.1 (N.H.) 1986, 792 F.2d 251.* Furthermore, the guarantee of the right to counsel

under Amendment VI is within the intendment of the due process clause. *Smith v. U.S.*, D.C.N.J.1966, 250 F.Supp. 803, appeal dismissed 377 F.2d 739.

Petitioners were also denied their right to due process when the opposition engaged court officials in evidence tampering and other unethical acts. A clear abuse of discretion within our legal system, this is contrary to *Galvan v. Press*, which states that fair play is the essence of "due process." *Galvan v. Press,* Cal.1954, 74 S.Ct. 737, 347 U.S. 522, 98 L.Ed. 911, rehearing denied 75 S.Ct. 17, 348 U.S. 852, 99 L.Ed. 671.

Finally, due process is violated whenever the performance of counsel, whether retained or appointed, is so deficient as to render the proceedings fundamentally unfair. *U.S. v. Alvarez,* C.A.Ga.1978, 580 F.2d 1251. To say that petitioners' performance as their own counsel was so deficient as to render the proceedings fundamentally unfair is an understatement.

III. KANSAS LAW IS UNCONSTITUTIONAL IN MANDATING THAT A CORPORATION MUST BE LEGALLY REPRESENTED IN A LAWSUIT

Petitioners filed their original petition in the name of Heffington Homes, Inc., using as a guide the petition prepared by defendant Ayesh when he represented them. At their first hearing, the district court dismissed their corporation but allowed Mark and Joan Heffington as individuals to remain as proper parties to the lawsuit.

The ruling and affirmation of the lower courts that Heffington Homes, Inc. as a corporation must be represented by a licensed attorney was in accordance with a previous case, *Atchison Homeless Shelters, Inc. v. Atchison County,*

24 Kan. App. 2d 454, 455, 946 P.2d 113, *rev. denied* 263 Kan. 885 (1997). However, the *Atchison* case does not address the issue the Heffingtons have that the defendants influenced attorneys not to represent them, thereby denying them due process of law under Amendments V and XIV to the U.S. Constitution. The evidence clearly showed that both Heffington Homes, Inc. and Mark and Joan Heffington were proper parties to this lawsuit, but petitioners were unaware of this argument early on. The appellate court's opinion that "they failed to properly raise this issue prior to appeal"is invalid, since any reasonable person would believe they could not have known every aspect of law and legal procedure in the beginning or even throughout litigation while trying to proceed pro se. The Heffingtons' denial of due process precludes the *Atchison* case and renders this law unconstitutional in this matter.

IV. PETITIONERS SHOULD NOT HAVE BEEN HELD TO THE SAME STANDARDS AS THOSE REPRESENTED BY COUNSEL

A. Right of Litigant to Be Heard is Fundamental Right of Due Process

This case begs a decision as to whether petitioners in this matter should have been held to the same rules as those represented by counsel, since numerous e-mails, letters and other documents they offered showed their due diligence to acquire such. Any reasonable person would conclude that the defendants and their counsel influenced attorneys, agencies and the news media to keep the Heffingtons from acquiring legal counsel so they would lose their case, thus violating their right to due process of law.

When petitioners' added claims of civil conspiracy/ collusion and fraud, it was as if they were physically present at hearings, but were denied the right to be heard because

they were not legally represented. Judges Kennedy, Wilbert and Woolley ignored pertinent facts and information in the briefs, affidavits, evidence and case law presented by petitioners. Much of their evidence was ignored by Judge Woolley in the second summary judgment hearings. Petitioners had clear and convincing evidence to establish a prima facie case in regard to all of their claims in this matter. In fact, a prima facie case of securities fraud based upon a misrepresentation could have been established in violation of Section 10(b) of the 1934 Securities Exchange Act and/or Rule 10b-5. The lower court was well aware of all of the violations in this matter and continued to offer petitioners no relief or assistance. The Heffingtons were denied due process when all claims were dismissed on technicalities due to their lack of legal expertise. Thus, the decision of the lower court to hold petitioners to the same legal standards as defendants in this matter was unconstitutional. The right of a litigant to be heard is one of the fundamental rights of due process of law. *Council of Federated Organizations v. Mize*, C.A.Miss. 1964, 339 F.2d 898. See also *Ricker v. U.S.*, D.C.Me. 1976, 417 F.Supp. 133, supplemented 434 F.Supp. 1251.

B. Petitioners Denied Equal Protection

Petitioners were denied equal protection because they were not treated fairly and equally during their litigation. Mrs. Heffington had recently become the first female builder to join the area builders association. When the flooding problem occurred and she was unwilling to take responsibility for the defendants' errors, any reasonable person would conclude that Mr. Galyon (on behalf of the "good ole boys") sought to put her out of business. Would the defendants and their counsel have treated Mrs. Heffington the same if she had been a man? It is quite evident that sex discrimination prevailed in this matter, causing petitioners denial of equal protection.

In addition, defense counsel and court took advantage of petitioners' errors at every opportunity in an effort to dismiss their claims. In contrast, defense counsel made numerous errors, which were overlooked by the district court. The due process clause under Amendment V encompasses equal protection principles. *Mathews v. de Castro*, Ill.1976, 97 S.Ct. 431,429 U.S. 181,50 L.Ed.2d 389.

C. Right to Trial By Jury Denied Petitioners Under Amendment VII

In light of all the evidence, any reasonable person would believe that defendants Cook, Lusk and Baughman, were clearly negligent in causing the flooding to petitioners' property. How, then, could any reasonable person believe the appellate court had carefully reviewed the record to conclude "the district court did not err in its dispositive rulings in favor of each defendant?" Indeed, their opinion that the "litigation should be brought to an end without trial" is a denial of petitioners' right to a trial by jury under Amendment VII of the U. S. Constitution . Protection of individuals against arbitrary government action is the great purpose of the due process clause under Amendment XIV. *Wilwording v. Swenson,* C.A.Mo.1974, 502 F.2d 844, certiorari denied 95 S.Ct.835, 420 U.S.912, 42 L.ed.2d 843, on remand 405 F.Supp. 447.

V. OUTRAGEOUS GOVERNMENT CONDUCT OF DEFENDANTS, COUNSEL AND COURTS VIOLATES DUE PROCESS AND SHOCKS CONSCIENCE

The facts in this matter point to an even broader constitutional problem not yet addressed by the court: a severe lack of justice in our justice system. This case makes it evident to any reasonable person that lawsuits and legal

matters are won based on which side pays their attorney the most money. Therefore, the guaranteed claim of "justice for all" in our Pledge of Allegiance does not exist.

It was always evident in this matter that the defendants were quite wealthy as compared to the petitioners. Indeed, defendant Ayesh had continually told petitioners while he represented them that the defendants had big money and power, and that they couldn't win because they had no money. He even confirmed to Mrs. Heffington that there is no justice in our justice system. It is evident in this matter that the poor and struggling are oppressed by the rich and powerful in our country to a much greater degree than imagined. It has gotten to the point that justice no longer exists. Unfortunately, money now rules over what is right.

For "outrageous" government conduct to succeed, it must be shown that challenged governmental conduct violated fundamental fairness and was shocking to a universal sense of justice mandated by the due process clause. *U.S. v. Haimowitz,* C.A.Fla.1984, 725 F.2d 1561, certiorari denied 105 S. Ct. 563, 469 U.S. 1072, 83 L.Ed.2d.504. A reasonable person would only have to review the following actions of the defendants, counsel and court toward petitioners to determine them shocking and/or outrageous:

A million dollar lawsuit changed to $5000 in one week...
Their own attorney telling them that the defendants had no responsibility... hiding the fact that the defendants had insurance to cover their claims... advising them to sign a $10,000 settlement agreement for $1...
Influencing numerous attorneys not to represent them...
Influencing local, state and national agencies not to assist them...
Influencing the news media not to give them publicity...
Ignoring 500 pieces of evidence & violations of more than 150 statutes & laws...

Disregard for the likelihood of flooding to a basement where two children slept…

A premier attorney admitting to them that "they're just going to keep beating you up, until they wear you down…"

Ignoring their repeated requests to settle, even after 9/11, knowing that petitioners and their family were suffering physically, emotionally and financially…

Removing, detaching and altering legal documents from their court file…

Bringing false charges against petitioners' son to cause them further distress…

The amount of evidence in this matter included: notes and e-mails written at the time the events occurred, GIS aerial and other photos of Cook's home blocking the stream, two expert witness reports, statements by three inspectors and three drainage experts that the basement would flood in a 6-inch rain, a drainage plan that even experts could not understand, testimony by the engineer that he failed to include a drainage easement, statements by defendants Cook Baughman and Lusk that they all met and agreed not to assist petitioners, affidavits which supported the claims of intentional fraud and punitive damages, attempts to settle, correspondence to numerous government agencies, attorneys and others to try and acquire legal assistance, and a "smoking gun" letter from defendant Cook's previous attorney which showed the defendants' and their counsel's attempts to conceal the fact that insurance existed.

In summation, the defendants and their counsel chose to hurt petitioners' family, ruin their business, run them out of money, try to fool them into believing they had no case, and then cause them to go through a legal matter without an attorney for over three years. If this wasn't shocking enough, a reasonable person would believe that they had also influenced court officials to engage in evidence tampering.

After petitioners' filed an appeal in this matter, a reasonable person would also believe that they used the legal system to bring false criminal charges against petitioners' 14-year old son to cause them further distress. This was certainly outrageous government conduct, since Mrs. Heffington's son tried to report a possible school shooting. Court-appointed attorneys insisted he would be found guilty, and petitioners' efforts to obtain dismissal through numerous government agencies proved futile. Their son suffered extreme mental anguish as the matter dragged on for 17 months to an unnecessary trial in which the erroneous charges were finally dismissed. Mrs. Heffington even addressed this in her oral arguments before the court of appeals - how the opposition had extended their illegal and unethical acts to include even petitioners' children. Such acts are shocking to anyone's conscience. Just as shocking is the ability of the court of appeals to ignore this fact and affirm the district court's decision in this matter.

This case has striking similarities to *U.S. v. Robinson* in regard to outrageous conduct of police officers. In this ruling, the words "police/police officers" are substituted with the words "lawyers/legal" as it applies to this case:

> "Factors to be considered in determining whether conduct of lawyers is so outrageous as to violate due process include the need for type of legal conduct, the impetus for the scheme, the control the government exerted over the criminal enterprise, and the impact of the legal activity on the commission of the crime." *U. S. v. Robinson*, C.A.6 (Ky.) 1985, 763 F.2d 778.

Mrs. Heffington later learned that intentional fraud and gross negligence can be deemed criminal acts, but the court refused to allow her additional claims which included tort of outrage. It is without question that the actions of the

defendants, their counsel and the courts are a clear violation of petitioners' right to due process, shocking to the conscience and considered "outrageous government conduct."

VI. CASE SHOULD BE DECIDED ON ITS MERITS AND REMANDED BACK FOR TRIAL TO ENSURE DUE PROCESS

The merits in this case were ignored by Judges Lahey, Kennedy, Wilbert and Woolley who dismissed all of petitioners' claims due to technicalities in preparing their paperwork and/or abuse of discretion. This is ironic, since the original opinion rendered by the court of appeals in this matter failed to include the name of defendant William E. Lusk, Jr. in the caption. This is contrary to K.S.A. 60-260(a), which states that "...while the appeal is pending, (clerical mistakes) may be so corrected with leave of the appellate court." If the Kansas Court of Appeals obtained permission from a higher court to correct this error, petitioners were never notified as such. In all fairness, petitioners ask for special consideration of any errors they may have made in preparing this writ of certiorari as pro se litigants. Again, fair play is the essence of due process. *Galvan v. Press, Cal.*

It has been shown that the petitioners were denied due process by the local, state and national governments in this matter, resulting in manifest injustice. The due process clause of Amendment XIV and Amendment V are directed at the protection of the individual, who is entitled to the immunity thereof as much against the state as against the national government. *Curry v. McCanless, Tenn.* 1939, 59 S.Ct. 900, 307 U.S. 357, 83 L.Ed.1339.

In addition to extreme losses of liberty and property, petitioners continue to suffer mental anguish due to the lack

of justice in this matter. In December 2003, Mrs. Heffington suffered a near breakdown as petitioners again face possible divorce and bankruptcy and their son awaits trial on more unwarranted charges brought against him. Consider also that Lot 9 and three other adjacent lots continue to flood to this day. Clearly, this matter deserves to be remanded back for the right to a trial by jury under Amendment VI to ensure petitioners' right to due process of law, and not dismissed on technicalities due to their errors.

VII. REQUEST FOR PASSAGE OF AMENDMENT XXVIII PRIOR TO FILING LAWSUITS OR CHARGES AGAINST A PERSON/ENTITY

It is widely apparent that lawsuits, particularly frivolous ones, run rampant in this country. This is largely due to people believing everything an attorney tells them, right or wrong, and the need for attorneys to increase their profits. One can sue for just about anything these days, and many attorneys are adept at feeding off of the emotions involved in any given situation. Frivolous lawsuits are won while those having merit are dismissed on technicalities with no right to a jury trial, as in this case. The lack of justice is best described by Bill O'Reilly in *Who's Looking Out For You?:*

> "Our justice system is overburdened, driven by money and connections, and sometimes downright corrupt, and few in power seem to care...This is a disgraceful situation and one that should be addressed by the Supreme Court immediately." [2]

The allegation that our justice system is based on money rather than justice has repercussions throughout society

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[2] *See* Bill O'Reilly, *Who's Looking Out For You?* 165, Broadway Books, N.Y. (2003).

which are damaging to our nation as a whole. If the side with the most money to pay their attorney wins, where is the justice for those with less? If left unheard by this court, it appears acceptable in our legal system for big business and government to "beat up" innocent women and children to win lawsuits. Indeed, this case should be considered *in terrorem populi*.

A solution is to adopt Amendment XXVIII to the United States Constitution to allow protection of citizens rights in two ways: (1) a person would have the right to be appointed counsel in a civil matter if they cannot afford it; and (2) computerization of all evidence prior to the filing of any lawsuits or charges against a person or entity would assist in ensuring "justice for all" in any legal matter.

A computer program could generate a percentage of likelihood that a party will win based on the evidence presented by both sides to their respective attorneys. This factor would immediately be revealed to the parties who could then decide whether to settle, drop the suit or continue the litigation. This method could significantly reduce the number of lawsuits filed, help to eliminate the unnecessary prolonging of legal matters and any illegal/ unethical conduct by attorneys, and ensure that justice remains in our justice system. Court caseloads would be lessened giving judges more time to adequately review cases, and opinions could be rendered based on true justice rather than the amount of money an attorney is being paid. Indeed, oppression would be lessened and a great amount of stress would be lifted from the people.

In summation, Amendment XXVIII is needed: (1) to prevent attorneys from violating constitutional rights of citizens; (2) to ensure that attorneys abide by the same laws as citizens; (3) to protect parties in interest that are not in the courtroom; (4) to protect the overall integrity of the system

of justice; and (5) to ensure that justice above money prevails in our legal system.

CONCLUSION

For all of the foregoing reasons, the petitioners respectfully pray that its petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

CORRECTED OPINION

NOT DESIGNATED FOR PUBLICATION

No. 88,617

IN THE COURT OF APPEALS OF THE
STATE OF KANSAS

MARK HEFFINGTON and JOAN HEFFINGTON,
Appellants,

v.

BOB COOK HOMES, L.L.C.; LUSK COMMUNITIES, INC., a/k/a LUSK REAL ESTATE CO.; HUCKLEBERRY, INC.; WILLIAM E. LUSK, JR.; BAUGHMAN CO., P.A.; PREFERRED PROPERTIES OF KANSAS, INC.; REMAX REALTY PROFESSIONALS; WESLEY E. GALYON; and MARK G. AYESH, *Appellees.*

MEMORANDUM OPINION

Appeal from Sedgwick County District Court; WILLIAM SIOUX WOOLLEY, judge. Opinion filed July 3, 2003. Affirmed.

Mark Heffington and *Joan Heffington*, appellants pro se

Jeff C. Spahn, Jr., and *Teresa L. Mah*, of Martin, Pringle, Oliver, Wallace & Bauer, L.L.P., of Wichita, for appellees Lusk Communities, Inc., Huckleberry, Inc.; and William E. Lusk, Jr.

Stephen L. Brave and *Alexander B. Mitchell, II*, of Klenda, Mitchell, Austerman & Zuercher, L.L.C., of Wichita, for appellee Wesley Galyon.

Scott J. Gunderson, of Nelson & Gunderson, of Wichita, for appellees Baughman Co., P.A., and Mark G. Ayesh.

David L. Vogel, of Powell, Brewer & Reddick, L.L.P., of Wichita, for appellee Bob Cook Homes, L.L.C.

Before KNUDSON, P.J. MARQUARDT, J., and PADDOCK, S.J.

Per Curiam: In seeking redress for flooding on their residential property lot, plaintiffs Mark and Joan Heffington brought this lawsuit against the developer of the housing addition, an engineering and survey firm, the builder of a home on an adjacent lot, two real estate agencies, the president of the local homebuilders association and their former attorney, alleging *inter alia* collusion and fraud. In addition, the Heffingtons allege defense attorneys and court officials engaged in illegal and unethical acts to thwart their legal claims.

We have carefully reviewed the record on appeal, considered each issue raised, and conclude the Heffingtons' claims of error are not persuasive. Accordingly, we affirm the rulings and judgments of the district court with the following explanation.

Dismissal of Civil Conspiracy, Fraud, and Collusion Claims

The Heffingtons argue the district court erred when it determined the fraud-based claims were not stated with particularity and dismissed the fraud, civil conspiracy, and collusion claims. An appellate court's standard of

review on these issues is stated in *Colombel v. Milan*, 24 Kan. App. 2d 728, 729, 952 P.2d 941 (1998) (quoting *Ripley v. Tolbert*, 260 Kan. 491, Syl. Pp 1,2,921 P.2d 1210 (1996):

> "Disputed issues of fact cannot be resolved or determined on a motion to dismiss for failure of the petition to state a claim upon which relief can be granted. The question for determination is whether in the light most favorable to plaintiff, and with every doubt resolved in plaintiff's favor, the petition states any valid claim for relief. Dismissal is justified only when the allegations of the petition clearly demonstrate the plaintiff does not have a claim."

> "In considering a motion to dismiss for failure of the petition to state a claim for relief, a court must accept the plaintiff's description of that which occurred, along with any inferences reasonably to be drawn therefrom. However, this does not mean the court is required to accept conclusory allegations on the legal effects of events the plaintiff has set out if these allegations do not reasonably follow from the description of what happened, or if these allegations are contradicted by the description itself."

In this case, the issue is whether the Heffington's amended petition pled its allegations with particularity as required by statute and case law. See K.S.A. 2002 Supp. 60-209(b); *Weigand v. Union Nat'l Bank of Wichita*, 227 Kan. 747, 755, 610 P.2d 572 (1980). The district court's determination requires an interpretation of law, and our standard of review is limited. See *Babe Houser Motor Co. v. Tetreault*, 270 Kan. 502, 506, 14 P.3d 1149 (2000).

Our review of the pleadings persuades us the district court properly concluded the Heffingtons failed to plead allegations of fraud with particularity as required by law. Their argument that unknown attorneys told them otherwise and that the presence of defendant Galyon at the hearing intimidated or brought pressure to bear upon the district judge is devoid of legal merit. We have determined the district court did not err in its dismissal of claims.

Dismissal of Heffington Homes, Inc.

Initially, the Heffingtons brought this suit in the name of Heffington Homes, Inc. However, the district court ruled the corporation could not be represented by someone other than a licensed attorney. The Heffingtons now argue they were unable to procure legal representation after firing defendant Mark Ayesh as the corporation's attorney, and a reasonable person would agree that they tried with due diligence to acquire representation.

For two reasons, we conclude the Heffingtons' argument to be unpersuasive. First, the issue was not properly raised before the district court before being raised on appeal. See *Dalmasso v. Dalmasso*, 269 Kan. 752, 765, 9 P.3d 551 (2000).

Second, this court has determined that a corporation cannot be represented in district court by someone other than a licensed attorney. *Atchison Homeless Shelters, Inc. v. Atchison County,* 24 Kan. App. 2d 454, 455, 946 P.2d 113, *rev. denied* 263 Kan. 885 (1997).

Failure to Recuse

At the commencement of the December 20, 2001, hearing on the defendants' motions for summary judgment, Judge Woolley disclosed he was a former partner in the law firm representing Lusk Communities, Inc., William Lusk, and Huckleberry:

> "All right. Before we start, I think the record needs to reflect that up until approximately December of 1996 I was a partner at Martin, Pringle - back then it was Martin, Pringle, Oliver, Wallace and Swartz. So at that point I was a partner with Mr. Spahn *(sic)*. As best I can recollect, I know Lusk was a client of the firm at that time. To the best of my recollection, I don't remember that I ever personally worked on any matters for Mr. Lusk. I don't remember Huckleberry, Inc., I don't remember Lusk Real Estate Company, Inc., but I do know that Mr. Lusk, Senior (father of the defendant William Lusk, Jr.) was a client of the firm. But that's all I can remember. I think the record needs to reflect that."

Judge Woolley left the courtroom to allow the parties to confer and returned to the courtroom at which time he was alerted to the fact that one of the parties had expressed a concern about Judge Woolley hearing the case.

In response, Judge Woolley made the following statement:

> "Now, with regard to a conflict of interest, I do not have a conflict of interest. You know, I don't have a material interest. And I do not represent any of the Lusk entities.

"The second issue is whether or not there is an appearance of a conflict of interest or an appearance of – that I would not be fair and impartial. And given the facts and circumstances that, number one, it's been five years since I've been associated with Martin, Pringle, number two, given that to the best of my recollection I do not remember ever having worked on a Lusk or Lusk entity case – to the extent that I know good things or bad things directly, obviously it would be imputed to me from that time and given that this case was filed this year, so I wouldn't have any kind of knowledge about this, and I don't. I mean I don't know these people. And I don't know Baughman. I don't know the people Associated with ReMax. I don't know Wesley Galyon. I do know Mark Ayesh professionally. I'm going to find that I can continue to hear the motion for summary judgment. All right? I want the record to be clear and then we will go from there."

The Heffingtons argue Judge Woolley abused his discretion when he decided not to recuse himself because sufficient grounds existed to cause a reasonable observer to question the judge's impartiality.

The standard to be applied to a charge of lack of impartiality is:

"whether the charge of lack of impartiality is grounded on facts that would create reasonable doubt concerning the judge's impartiality, *not* in the mind of the litigant filing the motion, but rather in the mind of a reasonable person *with knowledge of all the circumstances*." State v. Griffen, 241 Kan. 68, 72, 734 P.2d 1089 (1987) (quoting State v. Logan, 236 Kan. 79, 86, 689 P.2d 778 (1984)).

The appellants did not file a motion for a change of judge and made no attempt to comply with K.S.A. 2002 Supp. 20-311d. Judge Woolley stated on the record that he had not been a partner at Martin, Pringle for 5 years, had never represented the parties involved in the case, and had no knowledge of the parties except for Mr. Ayesh, who he knew in a professional capacity.

Under the circumstances, it cannot be said that a Reasonable person would have a reasonable doubt as to Judge Woolley's impartiality. Judge Woolley's decision to preside over the summary judgment hearing was not in error.

Failure to Comply with Rule 141 Standards

The appellants argue the district court erred in adopting the defendants' version of the facts as uncontroverted because the appellants had failed to comply with Supreme Court Rule 141 (2002 Kan. Ct. R. Annot. 189).

Kansas Supreme Court Rule 141(b) discusses the Requirements for responses to motions for summary judgment and requires:

> "(A) memorandum or brief setting forth in separately numbered paragraphs (corresponding to the numbered paragraphs of movant's memorandum or brief) a statement whether each factual contention of movant is controverted, and if controverted, a concise summary of conflicting testimony or evidence, and any additional genuine issues of material fact which preclude summary judgment..." 2002 Kan. Ct. R. Annot. 189.

Rule 141(a) requires that the memorandum or brief include "precise references to pages, lines and/or paragraphs of transcripts, depositions, interrogatories,

admissions, affidavits, exhibits, or other supporting documents contained in the court file and otherwise included in the record." 2002 Kan. Ct. R. Annot. 189.

In the event the opposing party has failed to comply with Rule 141(b), "the opposing party shall be deemed to have admitted the uncontroverted contentions of fact set forth in the memorandum or brief" of the moving party. 2002 Kan. Ct. R. Annot. 189.

The standard of review of the district court's determination to whether the party opposing a motion for summary judgment was deemed to have admitted the uncontroverted facts is abuse of discretion. *Plummer Development, Inc. v. Prairie State Bank*, 248 Kan. 664, 667, 809 P.2d 1216 (1991).

In the present case, the Heffingtons responded to the five separate motions for summary judgment filed by various defendants with the same document. The Heffingtons' response was not organized in such a way that the district judge could match the uncontroverted facts presented by the defendants with the response filed by the appellants. Many of the facts urged by the Heffingtons in their response did not controvert the defendants' facts, failed to properly cite to the record, or were unsupported by the record cited.

The Heffingtons argue their response to a previous motion for summary judgment heard by a different district court judge had not been found to fail to comply with Rule 141; therefore, their replies to later motions for summary judgment should not have been found deficient by Judge Woolley either.

The first motion for summary judgment filed by Lusk Communities, Inc., was heard on August 2, 2001. The presiding judge, Judge Karl Freidel, denied the motion for

summary judgment because discovery had not been completed at the time. However, the judge warned the Heffingtons that once discovery was complete, if the same facts were presented, the motion would be granted. Judge Freidel stated that the Heffingtons' response to the motion for summary judgment did not controvert the facts as presented by Lusk Communities, Inc.; however, some evidence was cited and some evidence was attached to the response. Judge Freidel determined the Heffingtons had substantially complied with the rule, even though the statement of uncontroverted facts had not been controverted by the Heffingtons.

However, Judge Freidel's ruling that the Heffingtons had substantially complied with Rule 141 in August 2001 had no bearing on Judge Woolley's determination that they had failed to comply with the rule 4 months later on a response to a completely different set of motions filed by the defendants. Judge Woolley did not abuse his discretion when he determined the Heffingtons had failed to comply with Rule 141.

The Heffingtons make a second argument that Judge Woolley erred when he failed to reconsider is decision. In their motion to reconsider, the Heffingtons explained that they had been unable to locate Supreme Court Rule 141, they had decided to respond to the separate motions for summary judgment with one document for the sake of convenience, and they failed to make precise page and line citations to the record because of time constraints.

The Heffingtons' motion to reconsider the summary judgment ruling is, in effect, asking for special consideration for their failure to comply with Rule 141. In *Mangiaracina v. Gutierrez*, 11 Kan. App. 2d. 594, 595-96, 730 P.2d 1109 (1986), this court said the following concerning the

responsibility of a pro se litigant in a civil case in responding to a motion for summary judgment:

> "The rule that governs this case is simple. A pro se litigant in a civil case is required to follow the same rules of procedure and evidence which are binding upon a litigant who is represented by counsel. Our legal system cannot function on any basis other than equal treatment of all litigants. To have different rules for different classes of litigants is untenable. A party in civil litigation cannot expect the trial judge or an attorney for the other party to advise him or her of the law or court rules, or to see that his or her case is properly presented in court. A pro se litigant in a civil case cannot be given either an advantage or a disadvantage because of proceeding pro se. Thus, the trial court did not err in failing to consider the fact that defendants were pro se at the time they were served with the motion for summary judgment."

The Heffingtons seem to believe that their failure to comply with the requirements of Rule 141 relates to the mere formalities of the rule; however, "Rule 141 is not just fluff – it means what it says and serves a necessary purpose." *Calver v. Hinson*, 267 Kan. 369, 377, 982 P.2d 970 (1999)(quoting *McCullogh v. Bethany Med. Center*, 235 Kan. 732, 736, 683 P.2d 1258 (1984)).

The Summary Judgment Ruling

We have determined that the district court correctly adopted the defendants' facts as uncontroverted because the Heffingtons failed to comply with Rule 141. In reviewing the district court's ruling, our standard of review is de novo. See *Veatch v. Beck*, 252 Kan. 1081, 1082, 850 P.2d 923 (1993). However, in determining the ultimate legal issue, we

do read the record in the light most favorable to the party against whom summary judgment was entered. *Bi-State Dev. Co., Inc. v. Shafer, Kline & Warren, Inc.*, 26 Kan. App. 2d. 515, 517, 990 P.2d 159 (1999).

In this litigation, the district court granted defendants' motions for summary judgment for various reasons. We do not believe any useful purpose would be served to extend our opinion with a detailed analysis of each motion and the reasons given by the district court to conclude a particular defendant was entitled to summary judgment. In our opinion the Heffingtons have been given adequate explanation by the district court as to why this litigation should be brought to an end without trial. It is sufficient that we have carefully reviewed the record an conclude the district court did not err in its dispositive rulings in favor of each defendant.

Request to Amend/Punitive Damages

After all of the fraud-based claims were dismissed, the Heffingtons filed a motion to amend their petition to add a claim for punitive damages against the defendants. The district court refused to allow the Heffingtons to amend their petition to allow for punitive damages because the affidavit they relied on to support the motion to amend was based on hearsay and the court determined it was insufficient to show "willful, malicious or wanton conduct or intent."

K.S.A. 60-3701, K.S.A. 60-3702, and K.S.A. 2002 Supp. 60-3703 are the applicable statutory provisions for claims of punitive damages. K.S.A. 2002 Supp. 60-3703 states that a district court

> "may allow the filing of an amended pleading claiming punitive damages on a motion by the party seeking the amended pleading and on the basis of the supporting and opposing affidavits (if the) plaintiff has established that

there is a probability that the plaintiff will prevail on the claim pursuant to K.S.A. 60-209, and amendments thereto."

The court in *Fusaro v. First Family Mtg. Corp., 257 Kan. 794, 897 P.2d 123 (1995),* examine the issue of what was required to show a probability that the plaintiff will prevail and determined it amounted to a clear and convincing standard on the part of the plaintiff:

> "The trial court is to consider the evidence presented in the opposing affidavits as well as other evidence in a light most favorable to the party moving for the amendment, and if the evidence is of sufficient caliber and quality to allow a rational factfinder to find that the defendant acted towards the plaintiff with willful conduct, wanton conduct, fraud or malice, the trial court shall allow the amendment. This is another way of saying that amendment will be allowed when plaintiff has established that there is a probability that plaintiff will prevail on a punitive claim..." 257 Kan. at 802.

On appeal, this court's standard of review is whether the district court abused its discretion in refusing to allow the amendment of the petition to include punitive damages. See *Fusaro*, 257 Kan. at 804.

Even when viewing the evidence presented by the Heffingtons in the light most favorable to them, the district court did not abuse its discretion in refusing to allow them to amend their petition to add a claim of punitive damages. The affidavit and other attached information (including a poem by the Heffington's son) did not show by clear and convincing evidence, as required by *Fusaro*, that the Heffingtons would have prevailed on such a claim. This is especially true because the fraud-based claims had already been dismissed by this point in the lawsuit.

Imposition of Sanctions

The Heffingtons argue the district court abused its discretion when it ordered tem to pay the defendants' attorney fees at the hearing on the request to add punitive damages. After a request for sanctions under K.S.A. 2002 Supp. 60-211 was made at the hearing on punitive damages, the district court made the following ruling:

> "What is before the court is your motion to allege a claim for punitive damages with an affidavit that regurgitates the claims that have already been dismissed by the court, and there really was no basis at this point in time for you to file that motion. I'm going to sustain (the Lusk entities') motion for sanctions. The attorney's fees that I will consider will be limited to the time necessary to prepare to respond to this one motion."

This court's standard of review of the district court's decision to grant attorney fees under K.S.A. 2002 Supp. 60-211 is abuse of discretion. *In re Estate of Mater*, 27 Kan. App. 2d 700, 711, 8 P.3d 1274, *rev. denied* 270 Kan. 898 (2000).

The district court found the Heffingtons' motion "caused a needless increase in the cost of the litigation, and that the claims and other legal contentions asserted by the plaintiffs in the Motion (for punitive damages) are not warranted by existing law." Under the circumstances, it cannot be said that the district court abused its discretion in awarding attorney fees, especially in light of the fact that claims relating to fraud and conspiracy had already been dismissed by the district court.

Miscellaneous Issues

There are many other issues that have been raised by the

Heffingtons in this appeal. We have considered each and every issue and the arguments they advance to persuade us of trial error. In each instance we have either concluded the district court did not abuse its discretion in controlling discovery and legal process of holding that, as a matter of law, the Heffingtons were not entitled to the relief sought.

For all of the foregoing reasons, we conclude the appellants have failed to substantiate any error by the district court that would warrant reversal or a remand for further legal proceedings. Any error that may have occurred was incidental and did not implicate the substantive rights of the Heffingtons. We leave undisturbed the judgments of the district court in favor of the defendants.

Affirmed.

A true copy ATTEST
Carol G. Green
Clerk Supreme Court

APPENDIX B

Supreme Court Order District Case No. 01C771 SG

IN THE SUPREME COURT

OF THE STATE OF KANSAS

Mark and Joan Heffington Pro Se
7145 Blueberry Lane
Derby, KS 67037

Case No. 02-88617-A

Mark and Joan Heffington, Appellants,
v.
Bob Cook Homes, L.L.C.; Lusk Communities, Inc., AKA Lusk Real Estate Co.; Huckleberry, Inc.; William E. Lusk, Jr.; Baughman Co., P.A.; Preferred Properties of Kansas, Inc.; ReMax Realty Professionals; Wesley E. Galyon; and Mark G. Ayesh, Appellees.

You are hereby notified of the following action taken by the court: Petition for Review by Mark and Joan Heffington. Considered by the court and denied.

Date: 09/24/2003.

Carol G. Green
Clerk

APPENDIX C

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS

U.S. Constit. Amendment V: "Nor shall any person ... be deprived of life, liberty, or property without due process of law."

U.S. Constit. Amendment VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial ... and to have the assistance of counsel for his defence."

U.S. Constit. Amendment VII: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved..."

U.S. Constit. Amendment XIV: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Denial of Rights Under Color of Law, including:

18 USC@242: "...whoever, under color of any law, statute, ordinance, regulation or custom, willfully subjects any person in any State... to the deprivation of any rights ... secured or protected by the Constitution or laws of the United States...shall be fined under this title or imprisoned, not more than one year, or both."

18 USC@245: "...whoever, whether or not acting under color of law, intimidates or interferes with any person from participating in ...(or)applying for or enjoying employment, or any prerequisite thereof, by any agency of the United States; shall be fined under this title, or impris-

oned not more than one year, or both."

42 USC @1983: "...every person who, under color of any statute, ordinance, regulation, ...of any State,...subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights...secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Kansas Uniform Land Sales Practices Act (under the Securities & Exchange Commission) including:

K.S.A. 58-3304(2): "no person may dispose of any interest in subdivided lands unless a current public offering statement is delivered to the purchaser...to examine...prior to the disposition."

K.S.A. 58-3306(a): "A public offering statement shall disclose fully and accurately the physical characteristics of the subdivided lands offered and shall make known to prospective purchasers all unusual and material circumstances or features affecting the subdivided lands..."

K.S.A. 58-3306(a)(5): "...the public offering statement shall include... information concerning improvements, including drainage-control systems..."

K.S.A. 58-3307(3): "the advertising material and the general promotional plan are not false and misleading..."

K.S.A. 58-3310(d): "The commissioner may intervene in a suit involving subdivided lands..."

K.S.A. 58-3315: "Any person who willfully violates any provision of this act... or omits to state a material fact is guilty of a felony and may be fined...; or such person may be imprisoned;...or both."

K.S.A. 58-3316(a)(b)(c): "Any person who disposes of subdivided lands in violation of K.S.A. 58-3304,... is liable as provided in this section to the purchaser... every person who directly or indirectly controls a subdivider, every employee of the subdivider who materially aids in the disposition... is also liable jointly and severally..."

Kansas Consumer Protection Act K.S.A. 50-626(a): "No

supplier shall engage in any deceptive act or practice in connection with a consumer transaction...(b) Deceptive acts and practices include...(1) representations made knowingly or with reason to know that: (D) property or services are of particular standard,...if they are of another which differs materially from the representation."

K.S.A. 58-3062(a)(14): "No licensee... shall engage in fraud or make any substantial misrepresentation."

K.S.A. 82a-301 (Cook): "Without the prior written consent or permit of the chief engineer of the division of water resources of the state board of agriculture, it shall be unlawful for any person, ...corporation...to: (a) construct any dam or other water obstruction,... (d) change or diminish the course,... of any stream within this state."

* More than 150 violations of laws, statutes, regulations ordinances, and cases identified by petitioners at the pretrial hearing in November, 2001.

Res ipsa loquitor – "the matter speaks for itself" as per Black's Law Dictionary

K.S.A. 60-260(a) "...while the appeal is pending, (clerical mistakes) may be so corrected with leave of the appellate court."

In terrorem populi – "to the terror of the people" as per Black's Law Dictionary

Kansas Supreme Court Rule 141: "(A) memorandum or brief setting forth in separately numbered paragraphs (corresponding to the numbered paragraphs of movant's memorandum or brief) a statement whether each factual contention of movant is controverted, and if controverted, a concise summary of conflicting testimony or evidence, and any additional genuine issues of material fact which preclude summary judgment.." 2002 Kan.Ct.R.Annot.189.

U.S. Supreme Court Rule 10(a) & (c) – previously cited

Rule 601A Canon 3E(1) & 3F: "A judge disqualified by the terms of Section 3E may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, out of the presence of the judge,

whether to waive disqualification. If following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, all agree that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding."

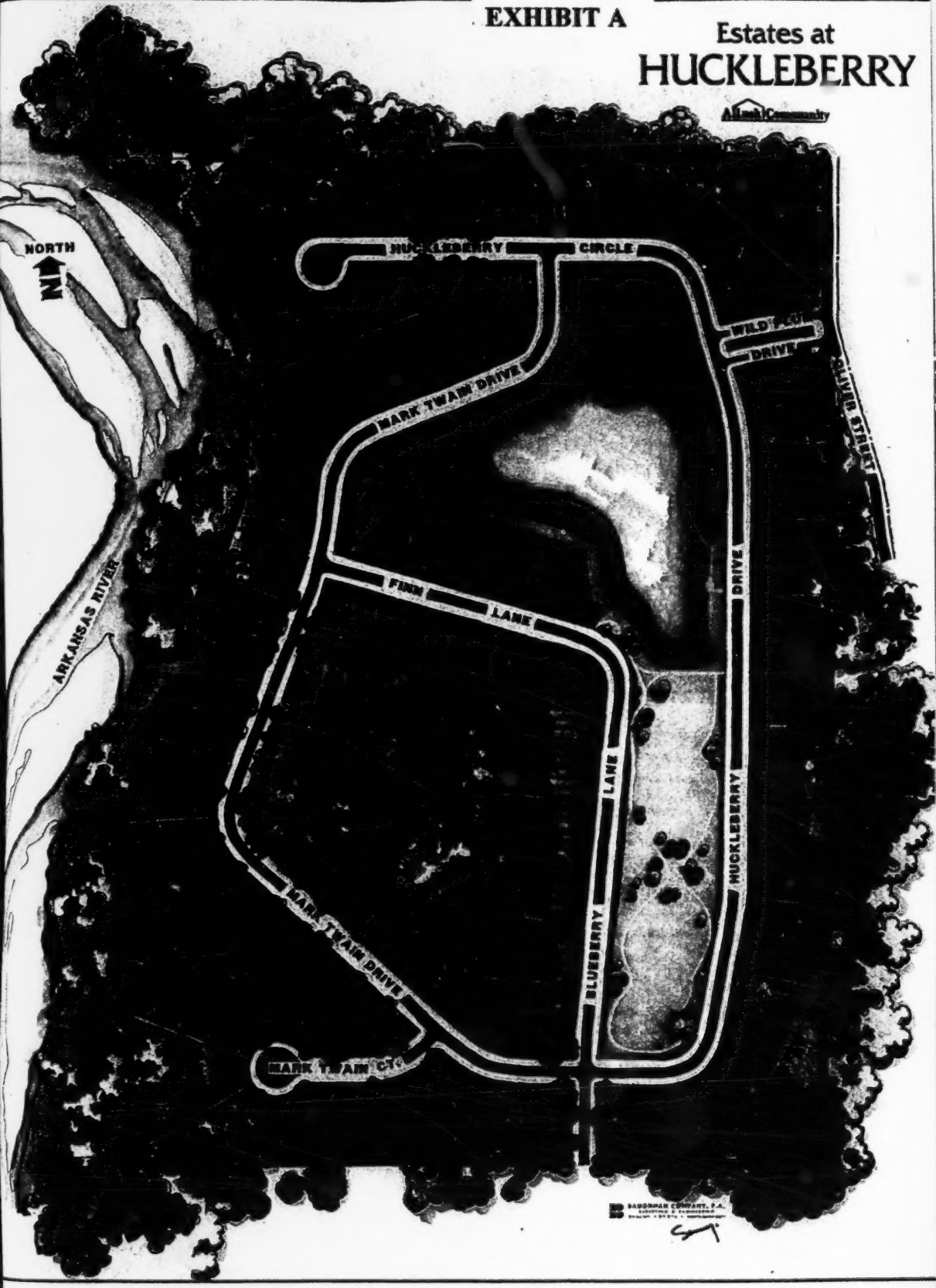
APPENDIX D

MISCELLANEOUS DOCUMENTS

Huckleberry Rendering.....EXHIBIT A
Huckleberry Plat.....EXHIBIT B
GIS Aerial Photo. .....EXHIBIT C
Flooding Photos.....EXHIBIT D
"Rumsey Letter".....EXHIBIT E
List of Damages. .....EXHIBIT F

Depo. Exhibit #4

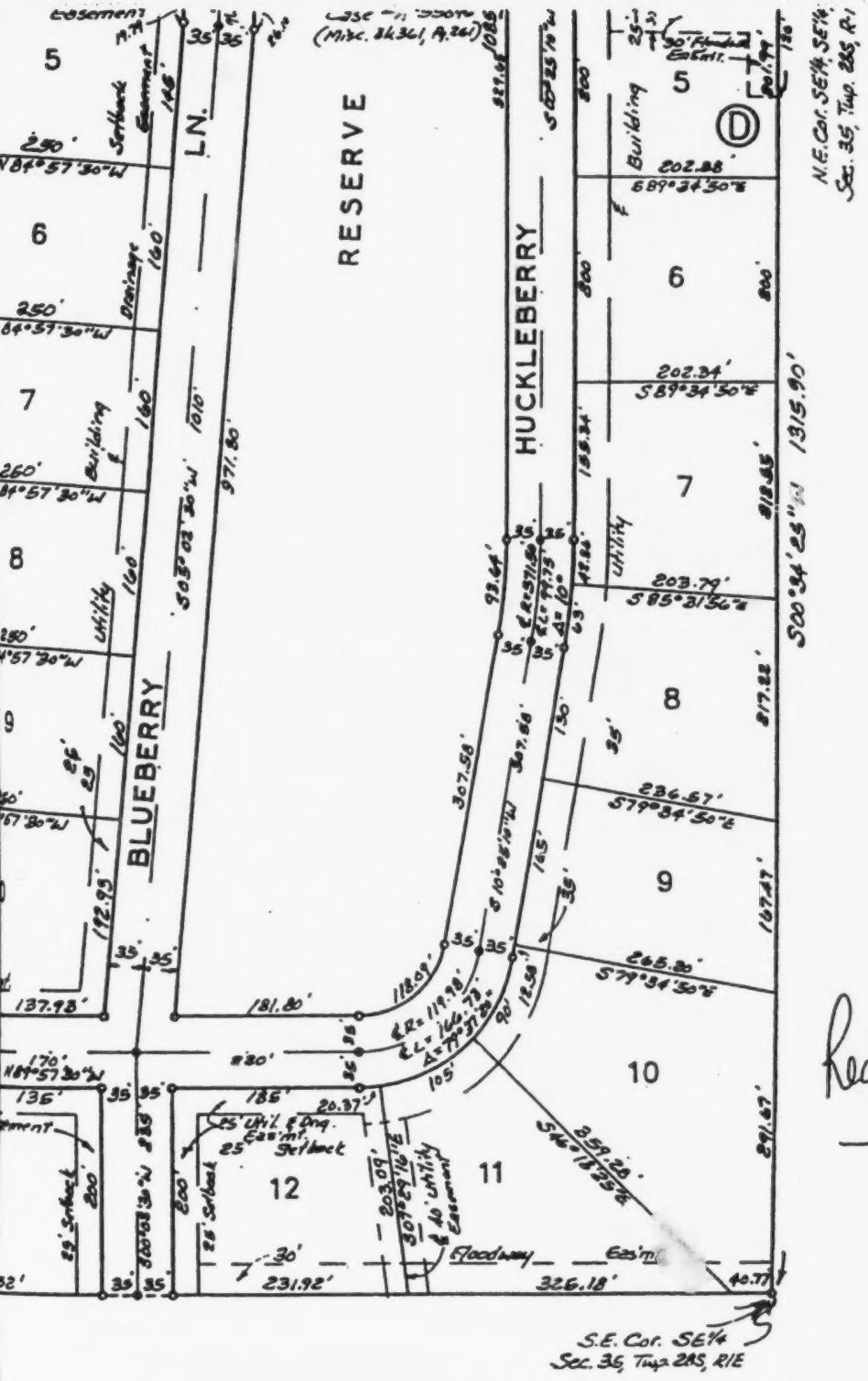
EXHIBIT A



A Lusk Community 207 South Broadway • Wichita, Kansas 67202 • (316) 267-2858 0075

BEST AVAILABLE COPY

EXHIBIT B



Copied from plat on file at Derby City Bldg. on 7/14/00, by Fred Smyth, City Eng. Coordinator 7/14/00

Sedgwick County, Kansas
Geographic Information Services
Division of Information and Operations

7140 Huckleberry, Aerial March 2000

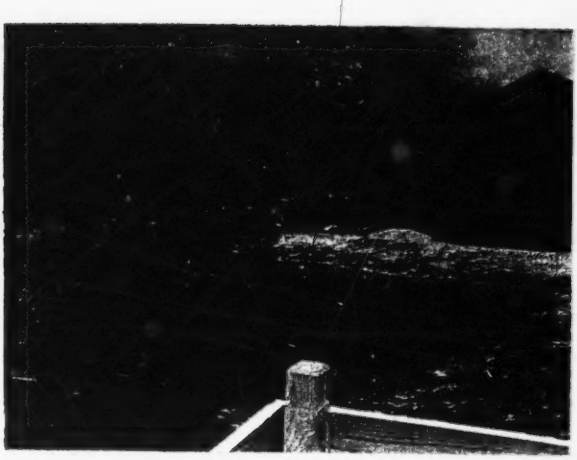
Sedgwick County, Kansas

It is understood that the Sedgwick County GIS Division of Information and Operations have no indication and reason to believe that there are inaccuracies in information incorporated in the base map.

The GIS personnel make no warranty or representation, either expressed or implied, with respect to the information or the data displayed.

Note: Public property represented on this map is not intended to be inclusive.

EXHIBIT D



Lot 9 (Views S.E. & So.) - MARCH, 2000

Lot 9 (Views N.E. & So.) - MARCH, 2001

Depo, Exhibit #124

RUMSEY AND CLEARY LAW OFFICES
1041 North Waco
Wichita, Kansas 67203-3998

RICHARD H. RUMSEY, P.A.
ROBB W. RUMSEY
MICHAEL E. CLEARY
(EMPLOYEES OF
PROFESSIONAL CORPORATION)

TELEPHONE
(316) 262-4481
FACSIMILE
(316) 262-8498
RICHARD H. RUMSEY, OF COUNSEL

EXHIBIT E

November 3, 2000

Mr. Bob Cook
Cook Construction Company
4414 South 231st West
Goddard, Kansas 67052

Re: Heffington Homes, Inc. vs. Bob Cook Homes

Dear Bob:

I have been submitted a check from Continental Western Insurance Company to you in the amount of $3,334.00 for settlement on the Heffington Homes matter.

I believe they wanted this check to go through your office so that Ms. Heffington would not know that insurance was involved. I think (rightfully so) they are concerned that if she knows there is insurance the settlement may fall apart.

Please come by at your earliest opportunity and pick up this check so that we can get this matter closed.

Thank you for your attention to this matter.

Yours very truly,

RUMSEY AND CLEARY LAW OFFICES

BY
Robb W. Rumsey

RWR:njs

DEC 11 2000

PLAINTIFF'S DAMAGES -
HEFFINGTON HOMES, Inc.

Mileage (3/00 to 10/00)	Est. mileage 7140 - 80 mi. X 29.5 wk X .32	$755.20
Mileage (3/01 to present)	Est. after filing suit - 65 mi. X 10 wk X .32	$208.00
Phone bills	Avg. $286.76 mo. X .25 X 7 mo.	$501.83
Phone bills since 3/01	Avg. $286.76 mo. X .25 X 2 mo.	$143.38
Intrust Bank, N.A.	Accumulated constr. loan interest 5/22 - 9/29	$5,837.78
WalMart	Color pictures/copies needed to file claim	$13.62
Lost interest on lot	Carrying costs for Tiara lot ($5.67 X 330 days)	$1,871.10
Lost profit	Dropped price during negotiations to ensure sale	$4,500.00
Lost time	Hrs. trying to sell house ($50 X 20 hrs X 29.5 wk)	$29,500.00
" "	Hrs. spent trying to get another loan (14 wks)	$14,000.00
" "	Hrs. preparing documents, filing, etc. (12 wks)	$12,000.00
Gordon Jones Appraisers	Additional appraisal required by Mulvane State Bank; 75% loan was then refused	$295.00
Lost income	Unable to continue work for 10 mo. (could have built and sold two more houses	$95,000.00
Defamation of business	Not allowed to build in some area developments, realtor refused to sell lots to me (8/00), passed real estate exam 7/00 as alt. business; could not find any brokers to work for (was told that I was "Typhoid Mary"...)	
	Real estate income loss ($50,000 X 10 yrs)	$500,000.00
	Contractor income loss ($200,000 X 10 yrs)	$2,000,000.00
Emotional distress	Having to stay on unemployment to pay bills, applying 5 times per week to find other work, 17-yr old son leaving home, other three children worrying about lack of money, charging groceries for seven months, cashing last of savings bonds to pay bills, drop in credit rating, questionable practices by our attorney (initial petition for $1 million dropped to $5000 a week later; comments that "they don't care that you're going under"; leading us to believe that $10,000 is all we could get, never telling us that we could just file a claim), facing possible foreclosure and bankruptcy, having to put our own house up for sale, difficulty in obtaining another construction loan to build due to near foreclosure & current financial state, marital stress which led to counselling, increase in alcohol/ tobacco consumption, asking our church for months to pray for our situation... ($250,000 X 3 defendants)	$750,000.00
Causes of action	Against Cook, Lusk & Baughman - Private nuisance, intentional private nuisance, negligence, trespass, breach of contract, breach of warranty, detrimental reliance	$1,000,000.00
	TOTAL (as of 5/9/2001):	$4,481,265.82